In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-630

TERMINAL FLOUR MILLS CO.
and GENERAL FOODS CORPORATION,
Petitioners,

v.

HELIX MILLING COMPANY,
Respondent.

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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INTRODUCTION

Respondent's reference to the Defense Supply Agency submarket (Resp. Br. 2-3) confuses the issue before this Court. Petitioners contend that, lacking any anticompetitive motive or effect on the market, their unconsummated agreement to sell the Igleheart Mill, as a matter of law, cannot violate Section 1 of the Sherman Act. The market shares of Petitioners, or either of them, are irrelevant to that issue, in light of Respondent's abandonment of its claim of attempted

monopolization under Section 2 of the Sherman Act.

Petitioners also wish to correct Respondent's statement of the case, in which it states:

> ". . . Contrary to Petitioner's [*sic*] statement of facts (Petition, p. 5), Helix has not abandoned its claim to enforce its alleged agreement with General to purchase the mill but will only be able to do so if it prevails in this case." (Resp. Br. 3-4.)

In fact, Respondent has abandoned that claim. At the pretrial hearing on April 10, 1972, which preceded the order of partial final judgment in the District Court, Respondent's counsel stated:

> "At that time, in October, November, '69, we were in a position to buy the mill for a million dollars. We are not in that position any longer. The money has gone elsewhere. A lot of it has gone into attorneys' fees. We are really not in a position to pay that price. We have lost the opportunity.
>
> "Furthermore, the mill, as a going business, isn't worth a million dollars anymore, because there have been freight rate charges that very adversely affected mills, such as this. The situation is quite different today than it was when these negotiations were going on."[1]

[1] Tr. dated April 10, 1972, p. 16. See also Resp. Op. Br. in Court of Appeals (p. 19) filed on or about July 24, 1973.

ARGUMENT

1. Respondent's contention that the Court of Appeals' decision reversing the summary judgment and remanding Respondent's Sherman Act claim for trial is not ripe for review is erroneous.

This Court's jurisdiction under 28 U.S.C. § 1254 (1) is comprehensive. The Statute provides that this Court may review cases from any Court of Appeals by a "writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree." There are no limitations as to the status of the case or the nature of the decision below. The fact that the Ninth Circuit remanded the case to the District Court for trial is not a bar to the exercise of this Court's jurisdiction to review that decision.[2]

Furthermore, the summary judgment of the District Court was a final judgment which disposed of all of Respondent's antitrust claims. The judgment of the Ninth Circuit reversing that judgment is appropriate for review because it was fundamental to the further conduct of the case.[3]

[2] *The Conqueror*, 166 U.S. 110, 113 (1896); *Forsyth* v. *Hammond*, 166 U.S. 506, 511-15 (1896); *United States* v. *General Motors Corp.*, 323 U.S. 373, 377 (1944). *See, e.g., United States* v. *Chas. Pfizer & Co., Inc.*, 404 U.S. 548 (1972), and *Wood* v. *Strickland*, — U.S. —, 43 L. Ed. 2d 214 (1975).

[3] *Land* v. *Dollar*, 330 U.S. 731, 734, fn. 2 (1946); *Larson* v. *Domestic And Foreign Commerce Corp.*, 337 U.S. 682, 685, fn. 3 (1948).

2. This is not a unique decision on unusual facts, but is one of widespread potential application.

Respondent argues that this case is inappropriate for review by this Court because the facts are "unusual" and the holding "narrow" (Resp. Br. 4). But its further contention that the Ninth Circuit's decision is "consistent with the policy of the antitrust laws to strike down *collaborative action* which prevents competitors from entering a given market" (Resp. Br. 4-5; emphasis added) precisely illustrates the broad scope of the decision and its damaging effect on legitimate business dealings and negotiations between participants in other concentrated markets. Whenever acquisitions are considered between competitors in any actually or arguably concentrated market, the parties, in order to avoid treble damage penalties, will have to predict not only the effect on the market and competition in it under Clayton Act standards, as the law has long required, but also the impact on the business aspirations of other possible bidders.

Despite Respondent's efforts to distinguish them (Resp. Br. 6), the decisions of other Courts of Appeal, holding that the mere existence of an agreement between market participants which necessarily results in a refusal to deal with a third party is insufficient to show a violation of Section 1 of the Sherman Act (Pet. Br. 10), illustrate the broad implications of the problem. In each of them, as in this case, there was no anticompetitive motive and no effect on the market or on competition, the only significant "effect" being one on the business expectations of the third party.

The Ninth Circuit's refusal to give effect to these well-settled decisions, which cannot be distinguished in any meaningful way from the present case, has created confusion in this area of the law.

CONCLUSION

The decision of the Ninth Circuit is a major departure in the law and should be reviewed by this Court.

Respectfully submitted,

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